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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/576,540	01/12/2007	Leonardo Jose S. Aquino	F7780(V)	4443

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EXAMINER	
PADEN, CAROLYN A	

ART UNIT	PAPER NUMBER
1781	

NOTIFICATION DATE	DELIVERY MODE
05/18/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No.	Applicant(s)	
	10/576,540	AQUINO ET AL.	
	Examiner	Art Unit	
	Carolyn A. Paden	1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *26 July 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-11* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-11* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *7-10-06*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claims 8-11 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. The claims all appear to depend from claim 9 and claim 9 depends from claim 10. There is no independent claim upon which to base the dependent claims.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d

937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-7 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-6 of U.S. Patent No. 7,510,737. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is not seen that the inclusion of a dairy base in the emulsion of the claims constitutes unobviousness, particularly when the prior patent suggests the use of butter fat as a fat source in claim 2.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bialek (7,510,737).

Bialek discloses low carbohydrate fiber containing emulsion. Mayonnaise is made in example 2 to include citrus fiber. A coarse emulsion is made from oil, whey, water and citrus fiber. The emulsion was homogenized at 200 bar and at 20 C. Lactic acid is included as an acidulant. The particle size of the fat droplet is disclosed at column 4, lines 42-47 to fall within the range of the claim 5. The claims appear to differ from Bialek in the recitation that the dairy base is one of the particular ingredients set forth in claim 1. It is appreciated that the particular ingredients of claim 1 are not mentioned in Bialek patent but to include cream or yoghurt in the mayonnaise would have been an obvious way to modify the flavor of the food. No unobvious difference is seen between the emulsion of the Bialek patent and the emulsion of the claim.

Applicant has provided evidence in this file showing that the invention was owned by, or subject to an obligation of assignment to, the same entity as the Bialek patent at the time this invention was made, or was subject to a joint research agreement at the time this invention was made. However, reference Bialek additionally qualifies as prior art under another subsection of 35 U.S.C. 102, and therefore, is not disqualified as prior art under 35 U.S.C. 103(c).

Applicant may overcome the applied art either by a showing under 37 CFR 1.132 that the invention disclosed therein was derived from the invention of this application, and is therefore, not the invention "by another," or by antedating the applied art under 37 CFR 1.131.

Claims 1-7 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 of copending Application No. 10/576,704. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is not seen that the co-pending claims are patentably distinct from the present claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-11 are provisionally rejected under 35 U.S.C. 103(a) as being obvious over copending Application No. 10/576704 which has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the copending application, it would constitute prior art under 35 U.S.C. 102(e) if published or patented. This provisional rejection under 35 U.S.C. 103(a) is based upon a presumption of future publication or patenting of the conflicting application.

Aquino discloses a method of making an emulsion where oil, water and fruit fiber are combined to make a coarse emulsion. Then the emulsion is homogenized at 35-650 bar at a temperature of 15-70C to produce a smooth emulsion where 95% of the oil droplets are less than 5 um (claim 10). The viscosity of the emulsion, shown in claim 13, falls within the range of the claims. Method claim 10 in Aquino differs from the present claims in the recitation of the particular ingredients of the dairy base but Aquino provides for this specific dairy base in the product claims. No unobvious or unexpected result is seen from the inclusion a dairy base in the process of the claims.

This provisional rejection might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the

copending application was derived from the inventor of this application and is thus not the invention "by another," or by a showing of a date of invention for the instant application prior to the effective U.S. filing date of the copending application under 37 CFR 1.131. This rejection might also be overcome by showing that the copending application is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2).

Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Farrer (WO 03/053149) in view of Han (US 6,416,797).

Farrer discloses producing an edible emulsion by mixing oil, water (p. 3, lines 7-14, p.17, lines 5-10), a thickener (p. 12, lines 30-33), citrus fibers (page 14, lines 30-34) as a cold hydrating viscosity enhancer in an amount of 3-30% by weight of a powder or tablet, which is later added to a variable a Amount of oil and water(p. 16, lines 4-12), and a caseinate (p. 17, lines 11-15) as a protein based emulsifier. The final emulsion that is coarse since it has not been homogenized. Farrer fails to disclose the size of the oil droplets present in the emulsion. However, Han discloses subjecting emulsified spreadable dairy products to a two stage homogenizing process (column 10, lines 23-57), by shearing at 50 C (column10, lines 15-22), and pressures of preferably 300 psi (20.5 bar) to 10,000 psi (689 bar) wherein the average particle size of fat droplets is reduced to 0.2- 3 microns. It would have been

obvious to one having ordinary skill in the art at the time of the invention to subject the emulsion of Farrer to the homogenization process disclosed by Han, because homogenization stabilizes the emulsion and allows it to remain in an emulsified.

Claims 1-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over vom Dorp (EP 0949295) as further evidenced by Francis and in view of Fischer.

Vom Dorp discloses a gelatin replacement made from wheat fiber gel and starch. In Example 1, yoghurt milk is prepared by mixing milk, sucrose and gelatin replacer together. The water and oil in the composition are components of the milk ingredient. This mixture would be expected to form a coarse emulsion of ingredients. Then the mixture was homogenized at 175-200 bar at 120C. The claims appear to differ from vom Dorp in the recitation of the use two homogenization steps but homogenization of milk products is typically carried out in a two stage process and Francis (page 1293, column 1, last paragraph) is relied upon to support this assertion. Also Francis teaches that homogenized milk is known in the art to include oil droplets of less than 10 um. One of ordinary skill in the art would expect the yogurt composition of vom Dorp to have the oil droplet size of the

claims because the oil in vom Dorp is from milk. The acidulant would be expected to be manufactured by the yogurt culture in vom Dorp during fermentation. The claims also differ in the inclusion of fruit fiber. Fruit preparation is included in the vom Dorp product. Further Fischer teaches the use of fruit fiber in yogurt preparations as a gelling, thickening and stabilizing agent. One would expect the fruit fiber of Fischer to be an obvious alternative to the wheat fiber gel of vom Dorp. It would have been obvious to one of ordinary skill in the art to substitute the fruit fiber of Fischer for the wheat fiber of vom Dorp as a gelling agent in yogurt. It is appreciated that the particular foods of claims 10 and 11 are not mentioned but yogurt is typically formulated into all of the foods of claim 10. The carbohydrate in the yogurt formulation would be substantially reduced during the fermentation of yogurt of vom Dorp.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-

1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1781